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In The

Supreme Court of the United States

October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ARGUMENT

Although Respondents and Amici have raised a number of new issues, Respondents have expressed some arguments not advanced by Amici. The first portion of this brief will therefore deal with arguments raised by Respondents, and the second portion of the brief will deal with general arguments made by Amici and Respondents.

I. Petitioners Allege a Pattern of Racketeering Activity.

On pages 21-30, Respondents discuss cases which they apparently feel should govern this case in determining whether a pattern has been met. They begin with a discussion of the Eighth Circuit's decisions on the pattern requirement and continue with a discussion of cases from other jurisdictions. The reasons for rejecting the Eighth Circuit's multiple scheme requirement have been discussed thoroughly in Petitioners' Brief, pp. 7-31. Respondents' cases from other jurisdictions simply echo the Eighth Circuit's multiple scheme requirement: the reasoning in these cases should likewise be rejected by this Court.

All of the cases cited by Respondents at pages 21-3 have denied a RICO claim by finding that only a single scheme or criminal episode existed.[1] This is simply the

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[1] *Beauford v. Helmsley,* 843 F.2d 103, 110 (2nd Cir. 1988) (finding "insufficient evidence of continuity in a single criminal episode regardless of how many fraudulent acts it entails."); *Jones v. Lampe,* 845 F.2d 755, 758 (7th Cir. 1988) ("The facts alleged by plaintiffs, however, show only one general scheme . . . concerned one major transaction . . . had four potential victims . . . one distinct injury . . . and threaten no repeated harm."); *Marshall-Silver Construction Company, Inc. v. Mendel,* 835 F.2d 63, 67 (3rd Cir. 1987) ("Here we have a single victim, a single

(Continued on following page)

inverse of a multiple scheme requirement. Therefore, such a limitation, is also in conflict with the RICO statute. The Act requires "a pattern of racketeering activity". 18 U.S.C. § 1962. It does not require a pattern of schemes or a pattern of episodes. Moreover, although the cases cited by Respondents have correctly focused on the element of continuity in attempting to define pattern, many of them appear to be confusing where the continuity must be found. Continuity simply means "not sporadic": "the target of [RICO] is thus not sporadic activity." S. Rep. No. 91-617, p. 158 (1969). In trying to limit RICO, often courts have incorrectly focused on the end goal or the

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injury, and a single short-lived scheme with only two active perpetrators."); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987) ("a single, limited fraudulent scheme, such as the misleading prospectus in this case, is not of itself self-sufficient to satisfy § 1961(5)."); *Eastern Publishing and Advertising Inc. v. Chesapeake Publishing and Advertising Inc.*, 831 F.2d 488, 492 (4th Cir. 1987) ("a single non recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context."); *Garbade v. Great Divide Mining and Milling Corporation*, 831 F.2d 212, 214 (10th Cir. 1987) ("there existed a clear and definite single objective for his [plaintiff's] acts."); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928 (10th Cir. 1987) ("The undisputed facts here reveal that the single scheme at issue involved one victim, . . . and had a single goal, the recovery of secret profits through self-dealing in the sale of DBC."); *Elliot v. Chicago Motor Club Insurance*, 809 F.2d 347, 350 (7th Cir. 1986) ("Because these predicate acts all clearly relate to the same transaction involving a single insurance policy and arising out of one accident, the acts do not support the continuity aspect of the pattern of racketeering."); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) ("Lipin's complaint alleges racketeering acts all designed to defraud one victim, Lipin, on one occasion . . ."). The Tenth Circuit has apparently adopted the Eighth Circuit's multiple scheme view without the qualifications that characterized earlier decisions. *Pitts v. Turner & Boisseau Chartered*, 850 F.2d 650, 652 (10th Cir. 1988).

scheme itself rather than the racketeering activity. *See Eastern Publishing & Advertising Inc.*, 831 F.2d 488, 492 (4th Cir. 1987), *pet. for cert. filed*, 56 U.S.L.W. 3667 (No. 87-1530 Feb. 17, 1988) ("There is no inference that the *scheme* embodies a threat of continued like activity in the future.") (emphasis added); *Torwest DBC Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987) ("no threat of continuing fraudulent activity can be inferred from the *nature of the scheme* itself.") (emphasis added). The statute, however, requires focusing on the repetition of the acts, not the repetition of the "scheme" or "episodes."[2]

Whether there are multiple schemes or one scheme is in essence a question of semantics. One can always find one goal for any amount of activity (e.g. earning an illegal profit); conversely, one can always break down one goal into many activities. Consider two interpretations of Petitioners' claims. The first is that Respondents have gained illegal profits through a pattern of bribery. In this interpretation, there is one scheme, one goal. The second interpretation is that there are multiple acts of bribery, committed by different actors, upon different commissioners, which occurred at different times, different places, in different manners, to influence different rate hearings which would affect different consumers. Depending on which court is interpreting the pattern requirement, either interpretation could suffice to state a claim under RICO. See Petitioners' Brief on the Merits, pp. 27-31.

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[2]Of course the same internal impossibilities created by the Eighth Circuit's multiple scheme vis-a-vis § 1962(b) exists in the cases cited by Respondents. Effectively, they write 1962(b) out of the statute. See pp. 7-31 of Petitioners' Brief.

This amounts to simple semantical game playing. See, *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (Higgenbotham, J.) (Commenting on whether his interpretation of pattern "invites unwarranted escape from RICO by a semantical game of generalizing the illegal objective, such as, . . . suggesting that a series of drug transactions are only part of the single offense of drug distribution." Judge Higgenbotham also noted that "[s]uch a generalized objective is undistinguishable from the very criminal enterprise the Act was plainly intended to reach.")[3]

Respondents also state that the conduct alleged by Petitioners "hardly epitomizes a serious 'racketeering activity' that RICO was designed to eradicate." Respondents' Brief, p. 34. They then list numerous offenses at which the Act was aimed, including attempting to bribe local police officers, and corruptly influencing the outcome of state court proceedings. *Id.* at 35. Surely bribing members of the MPUC is as serious as the aforementioned offenses.

[3]Some courts have indicated that one scheme is sufficient if there is independent harmful injury. If the court wanted to engraft this restriction onto the statute, Petitioners would still have stated a cause of action, even accepting Respondents' assumption that the same victims were injured. In *Liquid Air Corporation v. Rogers*, 834 F.2d 1297, 1305 (7th Cir. 1987) *pet. for cert. filed*, 56 U.S.L.W. 3531 (No. 87-1262 Jan. 28, 1988) the court found a pattern noting that each act resulted in a distinct and repeated economic injury upon a single victim of a single scheme. See also *Appley v. West*, 832 F.2d 1021, 1028 (7th Cir. 1987) where the court found that the two predicate acts were designed to defraud the plaintiff twice and therefore found a pattern. Both cases are cited at Respondents' Brief, p. 27. Petitioners in this case suffered economic injury each time that a higher rate was passed where the commissioners were bribed. *See, Suffolk County v. Long Island Lighting Company*, 685 F. Supp. 38 (E.D.N.Y. 1988).

In attempting to whitewash their activities, Respondents state that their actions appear more akin to traditional lobbying efforts. Respondents' Brief at p. 35. While taking serious issue with this argument, Petitioners must point out that this case was dismissed on the pleadings. Whether passing thousands of dollars to commissioners was lobbying activity or bribery is a fact question that should be decided by a jury. Even so, because the case was disposed of on the pleadings and without a factual record, the facts alleged in the complaint must be viewed "in the light most favorable to them [Petitioners]." Respondents' Brief at 11, citing *H.J. Inc.*, 829 F.2d at 649; Appendix at 6.

Respondents also allege that Petitioners' RICO claims fail to allege distinct injuries arising from the claimed predicate acts. Respondents' Brief at 36. Petitioners' second amended complaint under each RICO count alleges that the plaintiffs and the class were injured by reason of those activities. See paragraphs 54, 61, 70, and 74; Appendix, pp. 78, 79, 80 and 81. In addition, in each count Petitioners incorporated the whole complaint, including those paragraphs describing the predicate acts into each RICO count.

II. RICO's Scope Includes Both "Legitimate" and "Illegitimate" Persons/Defendants.

Amici have posed a number of theories for interpreting the pattern requirement under RICO. The contentions of all briefs filed in opposition to Petitioners can be narrowed to one basic argument; that RICO is not aimed at

"legitimate" defendants. Instead, they argue, "pattern" must be interpreted to mean that the acts characterize the "person"/defendant as a habitual or career criminal and these acts must be a substantial part of the "person's"/defendant's relationship with the enterprise.[4] Consequently, they argue that the paradigmatic defendant of RICO is an individual long associated with organized crime. Such an interpretation is not supported by the statutory language, the legislative history or the case law since the passage of the Act in 1970.

A. The Statutory Language of RICO Indicates that Congress Intended to Reach Both "Legitimate" and "Illegitimate" Persons/Defendants.

Amici contend that the scope of § 1962 was intended to encompass only individuals involved in "illegitimate" organizations. To determine what Congress intended, however, the Court must first look to the language Congress employed. *United States v. Turkette*, 452 U.S. 576 (1981). If the language of the statute is unambiguous, absent "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.* at 580, quoting *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). To determine whether the statute applies to "legitimate" as well as "illegitimate" individuals and entities, one need only look to the statutory language.

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[4]Respondents' Brief, pp. 38-39; Amicus Brief of the Chamber of Commerce of the United States of America, pp. 2, 9; Amicus Brief of the American Institute of Certified Accountants, pp. 6, 8, 15, 20; Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations, pages 2, 10; Amicus Brief of the National Association of Manufacturers, pages 4, 8, 9, 11, 15, 17, 21.

Section 1962(a) states that "[i]t shall be unlawful for *any person* who has received any income derived . . . from a pattern of racketeering activity. . . ." Section 1962(b) makes it unlawful "for *any person* through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise. . . ." Finally, § 1962 (c) makes it unlawful "for *any person* employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." (emphasis added). In sections a, b and c, the operative word is "person."

No ambiguity surrounds "person." It is defined in § 1961(3) as including "any individual or entity capable of holding a legal or beneficial interest in property." This definition is clear. It envisions individual and entity liability. There is no requirement that the individual or entity be associated with organized crime or that the individual or entity be a career criminal. This principle has been recognized by this Court in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *Sedima* specifically stated that no connection to organized crime was needed: "Section 1962 in turn makes it unlawful for 'any person'—not just mobsters—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. Sections 1962 a-c." *Id.* at 495. Despite the fact that "person" is already defined, and that definition acknowledged by this Court, Respondents and Amici, unhappy with the statute, now attempt to change the definition of "person" by backdooring a "mobster" requirement through the word "pattern." They would

achieve this result by suggesting that "pattern" means typical of a kind of individual. But "pattern" relates to activity. Respondent and Amici ignore the grammatical construction of the statute: "pattern" is used in conjunction with the word "activity"; not with the word "person."

"RICO takes aim at 'racketeering activity'." *Sedima*, 473 U.S. at 481. Indeed, the statute refers to a pattern of acts; not a pattern of persons. "Racketeering activity" is defined in § 1961(1) and encompasses a number of activities, including bribery, which is the activity alleged in this suit. The statute prohibits certain conduct which is prohibited regardless of what person or entity performs it. "There is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers." Blakey and Gettings, *Racketeer Influence and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple Law Quarterly 1009, 1029 n.92 (1980) (hereinafter referred to as *Basic Concepts*).

It is clear from the statutory language that Congress placed no restrictions upon the type of "persons"/defendants coming within the purview of RICO. RICO is not a recidivist statute. RICO is activity-aimed; not "person"/defendant aimed. That Congress could have limited Title IX, RICO, to habitual offenders is shown by a reference to other Titles of the Organized Crime Control Act of 1970. Section 3575 of Title X, entitled "Increased Sentence for Dangerous Special Offenders," deals with dangerous persons, including career criminals. Its provisions allow for increased sentencing for all felonies, including RICO, when the criteria in the statute are met. Title X

is person oriented. It is aimed at the defendant, not the activity. A defendant is classified as a special offender if "the *defendant* has previously been convicted . . . for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year . . .", § 3575(e)(1), or "the *defendant* committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of *his* income, and in which *he* manifested special skill or expertise;" § 3575(e)(2), or "such felony was, or the *defendant* committed such felony in furtherance of, a conspiracy with three or more other *persons* to engage in a pattern of conduct criminal under applicable laws of any jurisdiction. . . ." § 3575(e)(3) (emphasis added).

Both Titles IX and X were written by the same Congress in the same Act. Congress, in attempting to achieve separate goals defined the class person/defendant with limitations in Title X but defined the class "person"/defendant without such limitations in Title IX. Amici, realizing that they may have liability under the Title IX (RICO) definition of person, are trying to get this Court to do what Congress specifically chose not to do. Realizing that they cannot directly change the RICO definition of "person", Amici are trying to accomplish their goal (escaping possible Title IX RICO liability) by reading undefined concepts of organized crime, habitual, career, or professional criminality into Title IX. Had Congress wanted to

include these concepts, it knew how: it proved it did so in Title X.[5]

The distinction between Title IX and Title X was well recognized. Senator John McClellan, the sponsor of the Organized Crime Control Act of 1969 wrote a response to the critics of the bill in the fall of 1970 and distinguished Title IX and Title X.

> The basic provisions of title IX are substantive: they define conduct as prohibited. These provisions implement economic policy by authorizing the removal of corrupt influences from legitimate commercial enterprises, and the commission of an offense listed in title IX subjects one to the remedies of the title only if the offense bears a specified relationship to interstate commercial activity. Since the purpose of title IX is economic, it would be pointless surplusage for it to cover crimes that are not adapted to commercial exploitation. This is why the particular offenses which are well-suited for use to infiltrate a legitimate organization were listed in a section defining one of the substantive elements of title IX.
>
> Title X, in contrast, is not substantive: it deals solely with the penal disposition of individuals already convicted of substantive crimes. Its purpose is not confined to one sphere, such as economic policy, which can be treated separately from other problems. The activities of organized criminals extend beyond commercial exploitation, such as that treated by title IX, and bring them in violation of every felony in the books. The problem which title X solves is the problem of distinguishing the aggravated offender from the ordinary offender, and that problem is the same whatever felony was committed. It is the definitions of "dangerous special offenders" which appropriately limit the scope of title X, just as it is a list of offenses which limits that of title IX.

Senator John McClellan, *The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties,* Notre Dame Lawyer, 55, 161-62 (1970).[6]

It is interesting that Congress stated in § 3575(e) that "[f]or purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristcs and are not isolated events." In *Sedima*, this Court noted that these elements of "continuity plus relationship" combine to produce a pattern. 473 U.S. at 496, n.14. The Court then quoted the above definition from Title X and stated that the language "may be useful." *Id.* Indeed, an examination proves so. This definition satisfies both components of the court's definition of pattern. The first section of the Title X definition deals with the relationship element and the final four words deal with the continuity element. These same two components of the word pattern are required in Title IX, § 1962(a), (b) and (c) and consequently the same language can be used. No one has

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[5]Amici must recognize that their arguments are essentially political in nature, for a debate currently rages in Congress over the possible amendment of the RICO statute. Nevertheless, Amici attempt to disguise their political wolf in legal sheepskin in the instant case. If the statute needs to be corrected, "its correction must lie with Congress." *Sedima*, 473 U.S. at 499.

[6]Other sections of the Organized Crime Act are person-oriented as well. See generally Senator McClellans' article for a discussion of each of RICO's Titles.

criticized the Court's statement that § 3575 may be useful, and indeed, the definition is useful.[7]

The wording of Title IX, RICO, is clear. Nowhere is there any reference to limiting those "persons" engaged in racketeering activity to any specific group. The statute itself belies Respondents' and Amici's arguments that RICO does not apply to "legitimate" "persons"/defendants. Defendant Northwestern Bell is therefore correctly before this Court.

B. RICO's Legislative History Shows that Congress Intended RICO to Apply to both "Legitimate" and "Illegitimate" Defendants.

The Racketeer Influenced and Corrupt Organizations Act (RICO), part of the Organized Crime Control Act of 1970, was enacted as a result of the long process of legislative effort to develop new methods for dealing with organized crime. Although there is no consensus on what constitutes organized crime,[8] the tendency to identify or-

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[7]This definition has been used almost word for word in the state RICO statutes to define pattern, *See Morehead v. State*, 838 So.2d 629, 630 (Fla. 1980), and was previously applied in defining "pattern" by the Eighth Circuit. *See Alexander Grant & Company v. Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1985) *cert. denied*, 106 S.Ct. 799 (1986).

[8]For a discussion of the lack of consensus regarding the definition of "organized crime" see *Basic Concepts, supra* p. 8, at 1013, n.15. "However, the phrase is defined, the scope of the "Organized Control Act was not limited to the operations of 'organized crime.'" *Id.* Even if this Court viewed a requirement of an association with organized crime, it most likely would make the statute constitutionally suspect. Amendments had been offered to limit the bill to organized crime; but were rejected due to their perceived unconstitutionality.

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ganized crime with Mafia figures has been rejected by the author of the Act, Senator John McClellan. Gambling in America: Report of the Commission on the Review of National Policy Towards Gambling, 181-82 (1976) "In none of the hearings or in the process of legislation in which I have been involved has the term been used in this circumscribed fashion." RICO is therefore aimed at the broader concept of "enterprise criminality,"[9] in all its aspects. Indeed, RICO's scope beyond organized crime was objected to on civil liberties grounds. In response, Congressman Poff observed:

> The curious objection has been raised to S.30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime —as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. 35344 (1970) (Statement of Rep. Poff)

The AFL-CIO, at p. 13, conceded that Senator McClellan also acknowledged criticism that RICO included

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See, Blakey, *The Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 297 (1987). Even the Amicus Brief of the National Association of Manufacturers' noted that congress acknowledged that such a limitation would be an unconstitutional status offense. N.A.M. Brief, p. 10 In essense, Amici and Respondents are attempting to aim the statute at the person, which may well make it a status offense and unconstitutional.

[9]See, Blakey, *The Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 253 n.46 (1982).

activity that went beyond offenses committed by organized crime. Senator McClellan responded:

> The bar committee complains that the list is too inclusive since it includes offenses which often are committed by persons not engaged in organized crime. The senate report does not claim, however, that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial expectation unlike some other offenses such as rape, and experience has shown that they commonly are committed by participants in organized crime. That is all the Title IX list of offenses purports to be, that is all the senate report claims it to be, and that is all it should be.
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> It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

116 Cong. Rec. 18, 913-14 (1970). The AFL-CIO argues, however, that Senator McClellan made clear that RICO was not intended to reach beyond organized crime: "Thus, Senator McClellan minimized the 'danger that commission of such [listed] offenses by other individuals would subject them to proceedings under Title IX . . .[,] since commission of a crime listed under Title IX . . . provides only one element of Title IX's prohibitions.' " AFL-CIO Brief at 14. However, Amicus' interpretation is a contradiction. How could Senator McClellan acknowledge that RICO includes activities committed by those not involved in organized crime and then deny its reach beyond organized crime? Senator McClellan's statements should

be interpreted to mean exactly what they say: RICO's purview goes beyond organized crime and those who meet the criteria of RICO are subject to its provisions.

Just as telling in determining congressional intent, however, are the objections recorded by congressional members and other commentators. In the House, Congressman William F. Ryan, John Conyers, Jr. and Abner J. Mikvi objected to the bill as "a tool to be employed by all." H. R. Rep. No. 1549, 91st Cong., 2nd Sess. 187 (1970). The bill did not, they maintained, "make [a] discreet segregation of mobsters." *Id.* They also charged that the treble damage action "provide[d] invitation for disgruntled and malicious competitors to harrass innocent businessmen engaged in interstate commerce." *Id.*

In the Senate, Senators Phillip A. Hart and Edward M. Kennedy also expressed the concern that "the reach of [the] . . . bill . . . [went] beyond organized criminal activity." Sen. Rep. No. 619, 91st Cong., 1st Sess. 215 (1969). In addition, objections were made by the American Civil Liberties Union (ACLU) and the Association of the Bar of the City of New York. The ACLU recognized that RICO applied beyond organized crime and expressed concern that RICO provisions would infringe upon the civil rights of white collar and political activist defendants. *See, Basic Concepts, supra* p. 8, at 1018 n.55. Congressman Poff's reply indicated that he was well aware that RICO had a reach beyond organized crime:

> S.30 is objectional on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberty in particular, this objection is indeed strange. Have they forgotten that the Consti-

> tution applies to those engaged in organized crime just as it applies to those engaged in white collar or street crime? S. 30 must I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases.

116 Cong. Rec. 35344 (1970) (statement by Rep. Poff). The National Association of Manufacturers assume that this statement means any reach beyond organized crime would be small. However, "incidental" does not mean "minor"; it means "1. happening or likely to happen in fortuitous or subordinate conjunction with something else. 2. liable to happen or naturally appertaining (fol. by *to.*)" The American College Dictionary p. 612 (1962). In short, RICO's reach beyond organized crime was explicitly recognized as a natural consequence of the activities prescribed.[10]

Similarly, the Association of the Bar of the City of New York filed a written statement criticizing the scope of "racketeering activity" and stating that the reach of the bill extended beyond organized crime. Senator McClellan responded in detail on the Senate floor, acknowledging that the statute was originally drafted in response to organized crime, but that Congress had a duty to pass comprehensive legislation and that such an objection was not valid. *See,* Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L. Rev. 237, 272-

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[10]It should be noted that, in discussing Congress' addition of mail and wire fraud, Amicus National Association of Manufacturers concedes that as a result, it "did have the indirect consequence of broadening the reach of RICO beyond the Mafia." National Association of Manufacturers' Brief at 12.

73 (1982) (hereinafter referred to as *Civil Action*). In spite of these objections, the bill was passed.[11]

RICO was passed in response to problems created by organized crime. Both the House and Senate perceived the problem to be great enough so as to justify passage even though they knew it would reach beyond organized crime. Amici and Respondents ignore Congress' fully debated understanding of its own actions. They look at only what gave rise to RICO, not to Congress' actual intent. They are looking at the origins of the statute, and not the final bill. There is no rule that statutes must be confined to the problems which gave rise to the legislation. See *Diamond v. Chakrabarty,* 447 U.S. 303, 315-16 (1980) (where it was noted that "this Court frequently has observed that a statute is not confined to the 'particular application[s] . . . contemplated by the legislators'.") Because the Organized Crime Control Act, including Title IX was passed as a general reform statute, it conforms to a consistent policy whereby courts have not restricted statutes to the specific reason for their passage.[12]

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[11]For a detailed discussion of the entire legislative history in both the House and Senate, see, *Civil Actions, supra* p. 16, at 249-83; *Basic Concepts, supra* p. 8, at 1010-21.

[12]Blakey, & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?,* 62 Notre Dame L. Rev. 526, 530 n.13 (1987). (Hereinafter referred to as *Equitable Relief.*) For a discussion of this policy of non-limitation and citations to cases where it has been implemented, see, Goldsmith and Keith, *Civil RICO Abuse: The Allegations in Context, Brigham* Young Univ. L. Rev. 53, 73, n.85. (1986). *See also Equitable Relief,* at 566, n.187.

C. Case Law Indicates that RICO is not Limited in its Application to Illegitimate Businesses Only.

Sedima and *Turkette* are this Court's most recent pronouncements regarding the application of RICO. Both cases rejected attempts to place limitations on the statute. In *Sedima*, the court noted that civil RICO was being used against "respected and legitimate enterprises" instead of against mobsters and organized criminals. It commented however that Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *Sedima*, 473 U.S. at 499 *citing Turkette*. The court commented that "[t]he fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." *Id.* *Sedima* also found no ambiguity: "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* quoting *Haroco v. American National Bank and Trust Company of Chicago*, 747 F.2d 384 398, (7th Cir.1984), *aff'd* 473 U.S. 606 (1985).

In spite of these pronouncements by this Court, Respondents and Amici are again attempting to place virtually identical limitations on RICO. In *Sedima*, they sought to limit the word "person" to convicted criminals; here they seek to limit the word "pattern" to "career criminals". Indeed, Circuit Courts both pre and post *Sedima* have noted that RICO does not require proof that the defendant is connected with organized crime. *Bennett v. Burg*, 685 F.2d 1053, 1063 (1982) ("We join an increasing number of courts and commentators in concluding that RICO suits are not limited to contexts in which

a tie to organized crime is alleged."); *United States v. Aleman*, 609 F.2d 298, 303 (7th Cir. 1979) ("The clear implication is that it is realized that the Act is not restricted to members of organized crime, but can be used to reach out for others if the statutory conditions are met.").

In *Sedima*, the defendant was a corporation—no question was made as to whether it constituted a defendant that came within the purview of RICO. Furthermore, this Court need only review the table of cases in all the briefs in this case to see the long judicial history of applying RICO to civil "persons"/defendants without questioning whether they were "career criminals." Although Petitioners have demonstrated that there is division in the circuits regarding the application of "pattern of racketeering activity", courts, post-*Sedima*, have not indulged in the dead issue of whether the defendant shows signs of being a "career criminal." Surely this Court does not wish to overturn the lengthy RICO case law which has applied equally to all those who commit the acts defined in § 1961(1). This Court put the criminal argument to rest in *Sedima*—yet in a Lazarus-like attempt, Amici have seized this opportunity to seek its resurrection.

III. Respondents and Amici Definition of Pattern Would Effectively Exclude RICO's Application to White Collar Crime.

Respondents and Amici argue that RICO does not apply to "legitimate" businesses (allegedly like themselves), and that there must be a showing that the defendant is a "career criminal" whose actions are typical of and play a substantial part in the business. Of course this effectively precludes the application of RICO to white collar crime. But by accepting such an elitest argument,

this Court would be closing its eyes to major "racketeering activity" in this country. "White-Collar Crime is 'the most serious and all-pervasive crime problem in America today.' Conyers, *Corporation and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime,* 17 Am. Crim. L. Rev. 287,288 (1980). Although this statement was made in 1980, there is no reason to think that the problem has diminished in the meantime." *Braswell v. United States,* 43 Crim. L. Rptr. 3103, 3107, n. 9 (United States Supreme Court 1988) (Rehnquist, C.J.).

As has been discussed, Congress expected that RICO would be applied beyond organized crime; indeed, specific congressional references were made regarding the application to professionals. The history of RICO indicates that its language was addressed towards accounting firms, brokerage houses, banking, insurance, and stocks and bonds. *See Civil Actions, supra* p. 16, at 253 n.45, 254 n.48, 50, 257 n.56, 270 n.95 (1982).

Estimates of white collar crime in the fraud area alone indicates it to be in the $200 billion range. *See* Atty. Gen. Ann. Rep. 42 (1985). Fraud exclusively against the government, has been estimated to be between 2.5 and 25 billion dollars a year. *Civil RICO Abuse, supra* p. 17, n.12, at pp. 78, 79, nn.104, 106. In addition, so-called "legitimate" and even highly respected commercial enterprises in this country have engaged in criminal conduct to a surprising degree. Between 1970 and 1980, 1,043 major corporations were indicted for a variety of violations. Blakey & Cessar, *Equitable Relief Under Civil* RICO: *Reflections in Religious Technology Center v. Wollersheim, Will Civil RICO be Effective only Against White-Collar Crime?,* 62 Notre Dame L. Rev. 526, 535, n.36 (1987) (hereinafter referred to as *Equitable Relief*). The

suggestion by Respondents and Amici that this type of activity not be included under RICO raises a suggestion that racketeering acts committed by "legitimate" businesses is somehow not serious or not "real crime". The statistics regarding fraud however do not suggest such a result. "Legitimate" persons commit real crime; they commit serious crime. In *Furman v. Cirrito,* 741 F.2d 524, 528-29 (2d Cir. 1984), Judge Pratt observed:

> When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity," it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud," we can only conclude that by the RICO statute congress has provided an additional means to weed that "garden" of its fraud.

This sentiment was also well stated in *Sedima* where the court acknowledged that RICO has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Id.* at 499. The Court noted however that congress wanted to reach both "legitimate" and "illegitimate" enterprises and stated that "[t]he former enjoy neither an inherent capacity for criminal activity nor immunity from its consequences." *Id.* RICO therefore applies to all who violate its provisions whether they wear a white collar or a blue collar.[13] Respondents and

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[13]This principle, that RICO clearly applies to white collar crime, is specifically stated in *Papai v. Cremosnik,* 635 F.Supp. 1402, 1412 (E.D.N.Y. 1988), a case curiously relied upon by Respondents and the Amici. A full examination of that case reveals that Judge Moran intended that RICO apply to the very types of offenses that Respondent and the Amici are trying to argue are not within the purview of RICO. When Judge

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Amici's attempt to separate "them" from "us", the "haves" from the "have nots", the "blue collars" from the "white collars" cannot be accepted.

IV. The Rule of Lenity does not Apply to RICO.

Respondents and Amici argue that in construing RICO's provisions, the rule of lenity applies and requires a strict construction of the act. The rule of lenity has no constitutional status: it is instead a rule of the statutory construction to resolve ambiguity. "[T]hat 'rule', as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of a process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callahan v. United States,* 364 U.S. 587, 596 (1961) (Footnotes omitted). Quoted in *United States v. Turkette,* 452 U.S. 576, 587-88 n.10 (1981).

The rule of lenity need not be applied to RICO. This rule is based on two policies; (1) the principle of fair warning regarding what is proscribed, and (2) because of the resulting moral condemnation, the related principle that legislatures, not courts, should define criminal

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Moran used the phrase "regular part of the way a defendant does business" it is obvious that he used the word "regular" to mean, not an abberation, or a sporadic event, but rather, as he says, "ongoing." Otherwise, he would not have held that white collar crime comes within the purview of the statute. The *Papai case,* in no wav, supports the proposition that the person/defendant must be a "mobster" type or that the criminal activity must be a "substantial" part of the person/defendant's activity.

activity. *Dunn v. United States,* 442 U.S. 100, 112 (1979); *United States v. Bass,* 404 U.S. 336, 347-48 (1971). The principle that fair warning must be given regarding the criminality of an act is met when the predicate offenses are so construed. See *United States v. Swiderski,* 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied* 441 U.S. 933 (1979) ("requirement that each defendant be guilty of two acts of racketeering activity rebuts . . . argument that . . . the statute is unconstitutionally vague."). If lenity is applied, it must be applied to an interpretation of the predicate offenses which make up part of the RICO statute. This is especially true since the role of RICO is not to define a criminal act, but to set a legal standard. RICO makes it unlawful to engage in certain activity which has already been defined as criminal.

Similarly, the moral condemnation principle, also upon which the rule of lenity is based, is shown by the violation of the two predicate offenses. Through the application of the liberal construction clause, this condemnation may be enhanced, but it is the result of an express Congressional direction and not a result of a judicial determination. To the extent that RICO is a "remedial" statute, see Pub. L. 91-4 52, § 904(a), 84 stat. 947 (RICO is to "be liberally construed to effectuate its remedial purposes."), Congress felt that the policy of leniency was not appropriate in the context of RICO.[14]

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[14]*Basic Concepts, supra* p. 8, 1009, 1031-32 (1980). For a thorough discussion of the rule and its application see *Civil Actions, supra* p. 16, at 243 n.20, 245 n.25, 288 n.150 (1982).

On pages 20-21 n.7, Respondent suggests that because "pattern" is not clearly defined in the statute that RICO is

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V. The use of RICO has not Resulted in Serious Abuse.

Amici argue that RICO has resulted in serious abuse in that it encourages extortionate claims and results in windfall recoveries. The impact of abuses of claims has been overstated in that such frivolous actions, to the extent that they have occurred, have been dismissed at the pleading stages. Furthermore, despite anecdotes by those opposing RICO, there has been no showing that a pattern of windfall benefits has developed. Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 837 (1977) (hereinafter referred to as *Civil RICO Reform*). In fact, one commentator has commented that "[i]t almost makes one wonder what the fuss is about." *Id.* n.45.

Although abuse may occasionally occur, the issue has been exaggerated and adequate remedies exist. *Id.* at 69. *See also, Equitable Relief, supra* p. 17 n.12, at 526, 571 n.196. (Report of the Proceedings of the Judicial Conference of the United States, September 21 - 22, 1983 at 56 where it was reported that "the existing tools are sufficient, but perhaps not fully understood or utilized.").

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vague and therefore vulnerable to attack on constitutional grounds. Such a proposition was long ago rejected. *See, e.g. United States v. Parness*, 503 F.2d 430, 441-42 (2nd Cir. 1974) *cert. denied*, 419 U.S. 1105 (1975). Respondents do concede, however, that only by applying the factors of "continuity" and "relationship" and the legislative history of the "pattern" requirement "can the RICO Act provide an ascertainable standard and even arguably meet a vagueness challenge." *Id.* at 21, n.7. Respondents have, however, made no formal challenge to the constitutionality of the RICO statute and it is not an issue in this case. For a discussion of the rule of lenity in conjunction with the concept of vagueness, see *Civil Actions, supra* p.16, at 288 n.150.

These remedies include a more aggressive use of the Federal Rules of Civil Procedure. Specifically, Rule 12(b)(6), which authorizes dismissals for failure to state a claim, bringing a Rule 16 request for a pretrial conference geared toward eliminating any frivolous claims, a motion for summary judgment under Rule 56 and most especially the coordinated use of Rules 9(b) and 11, where sanctions may be given. For an in depth discussion of these Rules and their uses, see *Civil RICO Reform, supra* p. 24, at 86-97.

Abuse of RICO claims are being promptly handled and do not provide a basis for this court to follow Amici and Respondents' suggestion that further limitations be placed upon RICO. "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law . . . ." *Hoover v. Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J, dissenting) (footnote omitted).

Amici also suggest that because of the "racketeering" label, legitimate defendants have been coerced into settling unmeritorious claims. This is simply not the case. *See, Equitable Relief, supra* p. 17 n.12, at 596-97 n.193. Amici's authority for this proposition is a report of the ad hoc Civil RICO Task Force of the ABA Section on Corporation, Banking and Business Law 69 (1985). The Task Force conducted a survey of 3,200 corporate litigation lawyers only of whom 350 responded. The survey did not ask those surveyed a carefully phrased question regarding the use of RICO as a settlement tool. Despite

this obvious problem, the opinion that RICO may be used as a weapon requiring settlement was volunteered by only 2 of the 350 respondents. *Id.*

Amici's suggestion regarding settlement is also somewhat incredible. If a suit is "meritless", the chance of the plaintiff succeeding is zero. Why would a RICO defendant settle a case if the plaintiff's suit is meritless and would be dismissed or lost at trial? Such a view also ignores the plaintiff's view in bringing suit. Given the substantial costs of litigation, it is unlikely that a plaintiff would risk great sums on a claim that has no merit.

VI. Pattern is Defined by the Elements of "Continuity" and "Relatedness".

Respondents and Amici cite definitions from various dictionaries to support their view that "pattern" is not aimed at legitimate "person"/defendants but at career criminals who regularly conduct illegal activity as a part of their way of doing business. However, most of the definitions cited by the Respondent and Amici are not correctly applied in this case. The definitions, or common usage, must be from the time of the enactment of the statute. In *Perrin v. United States*, 444 U.S. 37, 42 (1979), a case involving the application of common law bribery, this Court stated: "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary

common meaning. . . . Therefore, we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961."

In reality, however, Amici and Respondents have mistaken exactly what needs to be defined. Congress has already provided a workable definition of the term "pattern." It has stated that two elements, "continuity" and "relationship," are needed to form a pattern. "It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969). Rather than seeking the definition of the term "pattern", we should define "continuity" and "relationship." Most courts have been in agreement regarding what is required to show relationship, and indeed, this element is not an issue here. Relationship generally means that the criminal acts are related to or have the same or similar purposes, results, participants, victims, or means of commissions, or show other interrelationships with distinguishing characteristics. See, *infra* p. 7.

The definition of the "continuity" element, however, has proved to be more elusive. Congress, here too, has defined the concept. The racketeering activity must not be "sporadic" and must show the "threat of continuing activity". *Id.* The acts must not be "an isolated event." *See*, S. Rep. No. 617, 91st Cong. 1st Sess. 158 (1969). None of these statements by Congress indicates that the continuity includes a requirement that the acts must be a part of the regular way the "person"/defendant does business, that the "person"/defendant must be a career criminal, or that the "person"/defendant cannot be "legitimate". This concept also does not indicate that the

racketeering activity must be separate or must be part of multiple schemes.

For racketeering acts to be "not sporadic" and "not isolated" they must be repeated or continuous, or capable of repetition. This satisfies the element of continuity. In order to determine if the acts are repetitive or capable of being repeated, however, the racketeering acts must always be timely viewed. Amici suggest that the element of continuity must be examined when the activity is over. However, this places RICO plaintiffs, or the government, in a Catch-22 situation. Many times, they cannot bring suit until the end of the activity because they are unaware it is happening or the defendants have been caught and the activity ended. Amici would then argue that because the activity is over, there is no continuity. The better view is that the acts must be evaluated while the activity is occurring rather than at its end or when the activity is discovered.[15]

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[15]*See, Barticheck* v. *Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1987) (rejecting the requirement of open-endedness, stating that such an interpretation "would deny a RICO cause of action in a case where this scheme had fully accomplished its goal."); *Liquid Air Corporation* v. *Rogers,* 834 F.2d 1297, 1308-09 (7th Cir. 1987) ("Continuity refers instead to the duration of the predicate acts"); *Sun Savings and Loan Association* v. *Dierdorff,* 825 F.2d 187, 194 n.5 (9th Cir. 1987) ("As long as a threat of continuing activity exists at some point during the racketeering activity, the continuity requirement is satisfied."); *City of New York* v. *Balkin,* 656 F. Supp. 536, 545 (E.D.N.Y. 1987) ("the threat of continuity is to be evaluated during the existence of the criminal activity, not after its discovery.")

An examination of the instant case in this context shows that the continuity element has been met. The activities of Respondents continued for a period of four years. The racketeering acts of bribery were repeated numerous times during that time. If Respondents had not been caught, this activity, no doubt, would have continued and was certainly capable of continuing. Furthermore, in this case, the fruits of the activity continue well into the future. Each rate case that was decided due to the bribery of the Minnesota Public Utility Commission resulted in higher rates than the one before. The class of people named in this Complaint have suffered excess rate upon excess rate. Northwestern Bell will continue to reap this benefit for many years to come. See *County of Suffolk v. Long Island Lighting Company,* 685 F. Supp. 38 (S.D.N.Y. 1988).

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CONCLUSION

The statutory language, the legislative history, and the case law do not support Respondents' and Amici's attempts to insulate themselves from the enforcement of Title IX (RICO). Therefore, Petitioners respectfully request this Court to reverse the Eighth Circuit's decision.

Respectfully submitted,

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